A

AZMI HARUN

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
DENIS ONG JCA
TENGKU BAHARUDIN SHAH JCA
[CRIMINAL APPEAL NO: J-05-88-2004]

C

22 MAY 2006

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Conviction under second limb of s. 304 Penal Code - Whether sentence manifestly excessive - Inadequacy of sentence - Whether Court of Appeal could enhance sentence - Courts of Judicature Act 1964, s. 60(2)*

D

This was an appeal by the accused against the six-year custodial sentence imposed upon him by the High Court pursuant to a conviction recorded under the 2nd limb of s. 304 of the Penal Code ('the PC'). The accused, a police officer in charge of the cells at the Batu Pahat Police Station, had earlier pleaded guilty to the said charge under the PC, and it was his contention that the sentence as meted out by the trial judge was manifestly excessive.

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Held
Per Gopal Sri Ram JCA:

(1) This was not a case in which the sentence was manifestly excessive. On the contrary, the sentence was grossly inadequate; the trial judge did not direct his mind sufficiently to the aggravating factors that were presented to him. Such aggravating factors clearly outweigh any mitigating points. (paras 6, 9 & 10)

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H

(2) That the prosecution did not cross-appeal against the sentence imposed by the High Court was not an impediment to the Court of Appeal acting on its own to enhance such sentence if it considered it grossly inadequate. The power to do so is encapsulated in s. 60(2) of the Courts of Judicature Act 1964, and it is exercisable even in the absence of an appeal or cross-appeal by the prosecution against sentence. (para 7)

I

[Sentence enhanced to nine years' imprisonment.]

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan tertuduh terhadap hukuman penjara selama enam tahun yang dikenakan ke atasnya oleh Mahkamah Tinggi akibat suatu sabitan di bawah cabang kedua s. 304 Kanun Keseksaan ('KK'). Tertuduh, seorang pegawai polis yang berkuasa di atas cel di Stesen Polis Batu Pahat, telah terdahulu memplid bersalah ke atas dakwaan tersebut di bawah KK, dan mendakwa bahawa hukuman yang telah dikenakan oleh hakim perbicaraan adalah terlampau.

Diputuskan
Oleh Gopal Sri Ram HMR:

(1) Ini bukan kes di mana hukuman adalah terlampau. Sebaliknya, hukumannya tidak memadai; hakim perbicaraan tidak mempertimbangkan faktor-faktor buruk yang telah dibawa terhadapnya. Faktor-faktor sebegitu jelas lebih penting daripada faktor peringanan.

(2) Bahawa pihak pendakwa tidak membuat rayuan balas terdadap hukuman yang dikenakan oleh Mahkamah Tinggi bukan satu penghalangan kepada Mahkamah Rayuan bertindak sendiri menambahkan hukuman jika ia berpendapat ianya tidak memadai. Kuasa untuk berbuat sedemikian terdapat di dalam s. 60(2) Akta Kehakiman Mahkamah 1964, dan ia boleh digunakan walaupun tiada rayuan atau rayuan balas dari pihak pendakwa terhadap hukuman.

[Hukuman ditambah kepada sembilan tahun pemenjaraan.]

Case(s) referred to:
Mohamed Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(2)
Penal Code, s. 304

For the appellant - Rosli Kamaruddin; M/s Rosli Kamaruddin & Co
For the respondent - Manoj Kurup

[Appeal from High Court, Muar; Criminal Trial No: 45-12-2004]

Reported by Gan Peng Chiang

A

JUDGMENT
(Oral)

Gopal Sri Ram JCA (delivering judgment):

B **[1]** This is the judgment of the court.

[2] This appeal is directed against the judgment of the High Court sentencing the instant appellant to a term of six years' imprisonment from the date of arrest. The complaint before us is that the sentence is manifestly excessive.

C

[3] The background to this case may be shortly stated. The appellant was originally charged with abetment of murder committed by 7 others arraigned with him. At the close of the case for the prosecution, all pleaded guilty to a lesser charge D framed under the 2nd limb of s. 304 of the Penal Code pursuant to an order of the trial judge. There is no appeal by the prosecution against the learned trial judge's order amending the charges.

E **[4]** The appellant was at the material time a Lance Corporal. He was in charge of the cells at the Batu Pahat Police Station. At about 4.30pm on 28 February 2003, one Kannan a/l Kanthan, who was in Cell F of the lock-up in question, was removed into Cell C, where there were other remanded persons. It is common F ground that an assault took place in that cell as a result of which the said Kannan died. We have had read to us a passage from pp. 87-88 of the appeal record which shows beyond reasonable doubt that the appellant moved the deceased from Cell F to Cell C at the request of one of the remandees in Cell C. It is also G clear from the evidence that after the assault was over, it was the appellant who removed the deceased from Cell C and took him back to Cell F with the assistance of the 3rd accused in the court below. After he had placed the deceased in Cell F, the appellant was seen showing his thumb in the raised position into Cell F, H possibly indicating his approval at what had happened. There is also evidence from PW17 and PW22 that the deceased shouted and asked for help and also that he screamed. This confirms that the deceased was in a helpless state with the appellant refusing to intervene.

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[5] From the aforesaid facts, it is clear that it was the appellant who played the key role in the death of the deceased. He obviously forgot that his role was to uphold the rule of law and not to act as a criminal himself.

[6] From a reading of the learned judge's judgment, it is abundantly clear that his Lordship, with respect, did not direct his mind sufficiently to the aggravating factors that were presented to him. Taking into account all the matters which we have adumbrated so far, we are of the unanimous opinion that there are no merits in this appeal. In short, the sentence is not manifestly excessive. Quite the contrary. In our opinion, this is a case in which the sentence is grossly inadequate.

[7] Learned counsel drew to our attention that there is no cross-appeal against sentence in this case. But that is not, in our view, an impediment to our acting to enhance the sentence if we consider the same to be grossly inadequate. The powers we have in this respect are encapsulated in s. 60 of the Courts of Judicature Act 1964. We would in this instance refer to the second subsection of that provision which reads as follows:

> 60(2) At the hearing of an appeal the Court of Appeal may, if it thinks that a different sentence should have been passed, quash the sentence passed, confirmed or varied by the High Court and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed.

We noted that the subsection does not postulate a cross-appeal by the prosecution for the exercise of the power. In other words, the power is exercisable even absent a cross-appeal by the prosecution.

[8] As we have already said, we find the sentence to be grossly inadequate. We have also said why we think so. The approach we take is based on the following direction given in the case of *Mohamed Abdullah Ang Swee Kang v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 where Mohd Azmi SCJ said:

> In assessing the length of custodial sentence, the Court must look at the overall picture in perspective by considering firstly, the gravity of the type of offence committed; secondly, the facts in the commission of the offence; thirdly, the presence or absence

of mitigating factors, and fourthly, the sentences that have been imposed in the past for similar offences to determine the trend of sentencing policy, if any. The fact that a sentence of imprisonment is imposed as a deterrence does not justify the sentencer in passing a sentence of greater length than the facts of the offence warrant. The gravity of the type of offence involved must be considered in the light of the particular facts of the offence. As stated by James LJ in *R v. Ladd & Tristam* [1975] Cr. LR 50; Encyclopedia of Thomas Current Sentencing Practice, p. 1058:

> We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective with the sentences that have been passed on other occasions for offences involving criminal activity of this kind, though of course varying in their gravity. Clearly a deterrent element has to be involved, but because the offences are very serious, it does not necessarily follow that on the particular facts very long sentences are justified.

[9] It is with the foregoing words in mind that we address the facts of this case. As we have already said, this is an offence which could not have been committed but for the intentional act of the appellant in transferring the deceased from Cell F to Cell C. It was urged upon us by learned counsel for the appellant that we should also take into consideration the absence of any evidence to show that the appellant had heard any screams coming from Cell C. But that invitation must be declined because it lacks logic. After all, it was the appellant who acceded to the request of the 7th accused to move the deceased from Cell F to Cell C. It defies logic and commonsense that the appellant was not aware of what was going on in Cell C after he had moved the deceased there.

[10] At the risk of repetition we would reiterate that the aggravating factors in this case outweigh any points in mitigation addressed to the court below. What was urged by learned counsel was that the appellant had 2 wives, 9 children, that neither of his wives was working, and that he was the sole breadwinner. With respect, these are not sufficient facts to mitigate the seriousness of the offence committed by the appellant. Having regard to the totality of the evidence, and taking into account the plea in mitigation, and weighing them all in the balance, we are satisfied that the appropriate sentence that ought to have been passed is

nine years' imprisonment. This, in our respectful view, sufficiently reflects the gravity of the offence and the role played by the appellant in its commission. Accordingly, in the exercise of powers conferred by s. 60(2) of the Courts of Judicature Act 1964, we would set aside the sentence of six years' imprisonment passed by the judge in the court below and substitute it with a term of nine years' imprisonment which is to take effect from the date of the appellant's arrest. The appeal against sentence on the grounds that it is manifestly excessive is, of course, dismissed.

[11] Before we conclude we must say this. This act by the appellant is an isolated one. It bears no reflection on the splendid work that the majority of the police force do in the discharge of their duties. Of late we notice a predilection among many, including judges, to be unduly critical of the police. While criticism is always welcome we must equally recognize the hard work and dedication that members of the police force display in the discharge of their daily duties.